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CIPC Panel on the Use of Classified Information by
Drug Enforcement Agencies:

A Report by the Acting Chairman

BACKGROUND

The deliberations of the CIPC's Narcotics Working Group led to production of the International Narcotics Coordination and Collection Study, as approved and promulgated by the DCI in February 1984. During these deliberations, the CIPC established a separate interagency panel to recommend policies for the Intelligence Community that would enhance the flow of intelligence concerning narcotics to designated US law enforcement agencies, while protecting the security of the information and of intelligence sources and methods. ☐

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The panel was asked to focus on three specific topics:

- security standards used by drug enforcement agencies,
- protection of sources and methods against indirect compromise, and
- use of intelligence and intelligence-derived information for law enforcement investigations. ☐

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In response to this charge, a nine member panel--originally consisting only of representatives from the Intelligence Community--commenced meeting in September 1983. The panel later was augmented by law enforcement representatives. ☐

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In the course of the panel's work, a number of events occurred which resulted in some of the issues being shifted to other forums. In addition, through an educational dialogue with law enforcement representatives, a number of perceptions changed and some issues became non-problems. In other words, the panel's work was overtaken by a variety of events. Nonetheless, there is utility in describing some of the panel's work and reporting on some of its findings to make them available for future reference. ☐

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GENERAL


Over the past two years, the Intelligence Community has seen an increased demand for support to US drug enforcement efforts. For example, intelligence agencies are being asked to



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As reported by the Deputy Director of Central Intelligence (DDCI) at a hearing conducted by the Senate Select Committee on Intelligence (SSCI) on 16 May 1984, there has been a dramatic increase in the analytical output by the Intelligence Community in 1983 and 1984, and information is flowing between the intelligence and law enforcement communities at an unprecedented rate. 

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With the significant growth in the provision of intelligence to law enforcement customers, there has been an understandable concern on the part of many in the Intelligence Community with regard to the increased potential risk for compromising sensitive sources, methods and activities, particularly in situations where intelligence material is used as a basis for prosecution of drug traffickers. In that specific regard, the Director, NSA, in his prepared statement for the SSCI hearing on 16 May 1984 noted that although it is not all clear that the protection accorded national security information during a trial would be sufficient given the extreme sensitivity of NSA sources and methods, at this stage there is little that can be done to eliminate this indefinite problem. He went on to say that NSA is taking precautionary measures which should help--for example, Memoranda of Understanding with law enforcement elements--and that the Department of Justice has established a Task Group to investigate the problem on a more comprehensive basis. He concluded with the remark that, should the security problems suggested by these concerns become real problems, the nature and scope of NSA's activity then will have to be thoroughly evaluated. 

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INTERVENING EVENTS

Among the events that tended to moot the deliberations of the panel are the following, many of which resulted either directly or indirectly from the activities of the CIPC Working Group or recommendations contained in the aforementioned CIPC report on International Narcotics Coordination and Collection:

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- In a 11 November 1983 letter to the Attorney General, the DCI expressed his concern over the protection of intelligence information relevant to narcotics, and suggested that a "brainstorming" session among Justice Department officials and Intelligence Community attorneys to discuss this and related issues would be helpful (copy at Tab A);
- Subsequently, officials in the Intelligence Community, the narcotics enforcement agencies, and the Department of Justice have been discussing ways to improve coordination and communication regarding the use and protection of intelligence information in support of international narcotics interdiction and criminal investigations and prosecutions. Work of this legal panel is continuing;
- There has been an exchange of correspondence among the Department of Transportation, GSA's Information Security Oversight Office (ISOO) and the National Security Council Staff on the subject of the basic authority of law enforcement agencies to classify narcotics enforcement information. The NSC response--supporting the ISOO--notes that information relating to international narcotics trafficking, while not classifiable in and of itself, may be classified when such information is derived from or linked to information within an existing classification authority. Copies of this correspondence are attached at TABs B and C;
- As referenced above, NSA has initiated discussions with law enforcement organizations which engage in communications monitoring with the objective of concluding Memoranda of Understanding which will include provisions governing protection of sensitive intelligence sources and methods;
- As a direct result of the CIPC study, the Chairman of the DCI's SIGINT Committee has been directed to work with NSA and appropriate members of the law enforcement community to review policy issues relating to the signals collection effort by law enforcement organizations. ☐

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DELIBERATIONS OF THE PANEL

The composition of the original panel (a list of participants is attached at TAB D) reflected a primary focus on security policy and on legal issues that may arise when drug agencies utilize intelligence in their interdiction and prosecution efforts. Operational considerations were not addressed and the panel's membership did not, at the outset, include representatives of the law enforcement community. Subsequently, panel members met with representatives of the Drug Enforcement Administration, Customs, Coast Guard and the Justice Department in order to exchange information and clarify issues. ☐

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A. Security Standards Used by Drug Enforcement Agencies

A large proportion of the panel's discussions focused on the Intelligence Community's need to be assured that its product is afforded appropriate security protection by law enforcement recipients. ☐

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Drug enforcement agencies have not been accustomed to handling large quantities of highly classified material. As the flow of SCI material has increased, law enforcement recipients have been faced with the need to review physical handling procedures, to upgrade voice, record and data communications, and to increase the number of SCI clearances held both at headquarters levels and in the field. Such expansion is not easy to accomplish rapidly, and the Intelligence Community needs to recognize and be prepared to deal with this timing factor as plans for expanded service are pursued. ☐

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As the panel engaged in dialogue with law enforcement elements, it was readily apparent that these elements are indeed cognizant of the need to protect SCI and that they are responsibly moving forward to improve and expand processes and procedures in order to accommodate the receipt and handling of increased amounts of intelligence information. At the same time, it was recognized that as this expansion occurs, there are likely to be "growing pains"; more important, it is certain that required increased protection capabilities will lag actual needs. As an example, favorable budgetary decisions to acquire and install secure record, voice, and data communications will not result in immediate solutions, since it will inevitably take months and, in many cases, years to result in the fielding of operational systems. ☐

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In this kind of environment, as new arrangements for providing SCI to law enforcement organizations are contemplated, it would be prudent for both the provider and the recipient of the intelligence to conduct case-by-case reviews of relevant security considerations, and the provider of such information should be assured that appropriate security arrangements are in place before any material is provided. Both NSA and CIA have spent considerable time during the past year working with law enforcement elements in this regard, and this continued close cooperation relating to the protection of sensitive intelligence should continue. ☐

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B. Protection of Sources and Methods Against Indirect Compromise

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C. Use of Intelligence and Intelligence-derived Information for Law Enforcement Investigations

The final issue considered by the panel concerns legal considerations relevant to the Community's ability to ensure the security of its intelligence sources and methods and other classified information provided to drug enforcement agencies.

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It is recognized that information provided by the Intelligence Community may result in or otherwise contribute to a criminal prosecution. It is possible, for example, that a criminal defendant would attempt to force public disclosure of the information, resulting in compromise of sources and methods.

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Although, as a general rule, the Government can deny a defendant access to Government information that is not material to the case, under the Federal Rules of Criminal Procedure, a criminal defendant is entitled upon request to inspect any documents that are in the Government's possession that is material to the case. A refusal by the Government to permit access may well result in the defendant's seeking to compel discovery by subpoena.

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It should also be noted that a court may require an in camera review of intelligence information in order to make a determination on the legality of the collection activity. While it is possible that a judge might find a previously authorized intelligence activity to have been unlawful, current procedures and requirements for legal review within the Community and with the Department of Justice would tend to minimize the possibility of that occurrence.

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While the foregoing would indicate that lawfully collected intelligence information that is neither material nor relevant to a criminal defendant's ability to conduct a defense would probably be beyond the reach of a criminal defendant in court, more difficult problems arise where the information at issue may be important to the prosecution's case. For example, the prosecution may wish to introduce the contents of a

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in order to prove that a conspiracy to violate the drug laws has occurred. Also, law enforcement agencies seeking to obtain a warrant against a criminal target

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may require the revelation of the intelligence information in order to show that there existed a probable cause to believe the individual engaged in illegal activities. In either event, the introduction and disclosure of intelligence information would be relevant to the prosecution's case, which could not proceed without the particular information. ☐

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Because of these and other complex legal matters, it was considered appropriate for legal experts from the Community to work with representatives of law enforcement agencies and the Department of Justice in addressing this general subject. These legal discussions are continuing. ☐

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SUMMARY

To summarize, the CIPC Panel on the use of Classified Information by Drug Enforcement Agencies convened in September 1983 and held numerous meetings over a period of several months. The discussions held within the panel and with representatives of the law enforcement community were wide-ranging and very useful in adding clarity to the issues which were addressed and establishing better mutual understanding among the conferees. A number of events occurred which had the effect of overtaking much of the panel's work, and major aspects of two key issues are now being explored in other forums. This report is submitted, without specific recommendations, as a matter of record. ☐

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Central Intelligence Agency



Washington, D.C. 20505

11 NOVEMBER 1981

Honorable William French Smith
Attorney General
Department of Justice
Washington, D.C. 20530

Dear Bill:

I have been concerned about the problem of unauthorized disclosures of sensitive intelligence information for some time and I know that you share my concerns. I very much appreciate the assistance you have provided in tackling this problem, particularly your promulgation of the Willard report and your support of NSDD-84. I think that it is now time for us to focus on additional areas where productive efforts might be undertaken. I would note, for example, the problems which have been raised by General Faurer in his letter to me, which I am enclosing. I am persuaded that a "brainstorming" session involving senior Department of Justice officials and senior Intelligence Community attorneys would be most helpful. If you identify for me a senior official in your Department who would coordinate such a session, I will have my General Counsel, Stan Sporkin, get in touch with that individual to help plan the session's agenda.

One additional subject which I believe should be discussed at this session is how to protect intelligence information when that information is relevant to narcotics or export control cases.

If this session is structured as a one-day conference/seminar that includes senior Justice, FBI officials as well as senior Intelligence Community legal personnel, I believe it would be extremely productive. It would help to focus thinking and perhaps might lead to a resolution of issues which have been troubling us for some time.

Sincerely,

A handwritten signature in dark ink, appearing to read "Bill Casey".

William J. Casey
Director of Central Intelligence

Enclosure: SCI Material

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 General
Services
Administration

Information Security
Oversight
Office

Washington, DC 20405

February 7, 1983

Honorable Elizabeth H. Dole
Secretary of Transportation
Washington, DC 20590

Dear Madam Secretary:

Executive Order 12356 (the "Order"), signed by the President on April 2, 1982, prescribes a uniform system for classifying, declassifying and safeguarding national security information. Section 5.2 of the Order provides that the Information Security Oversight Office (ISOO) shall be responsible to the President for monitoring its government-wide implementation. Among the specific tools of the ISOO Director are the authorities to conduct on-site program reviews of those agencies that create or handle national security information and to mandate the declassification of information that the Director determines should not be classified under the Order. Determinations under this latter authority, which ISOO invokes rarely, may be appealed by the head of the classifying agency to the National Security Council.

On January 11, 1983, during a routine liaison meeting between ISOO's Harold Mason and Department of Transportation (DOT) security officials, a DOT representative presented Mr. Mason with a newly-prepared United States Coast Guard classification guide entitled "Commandant Instruction 5510." A classification guide is an instruction issued by an authorized original classifier prescribing classification levels and durations for specified categories of information. Because of his concern with the categories of information to be classified, Mr. Mason brought the Coast Guard guide to the attention of ISOO Deputy Director Robert Wells and me. We shared his concern and requested a meeting with responsible DOT officials to discuss the guide.

On January 19, 1983, we met with Karen Lee, DOT Deputy Assistant Secretary for Administration, Rear Admiral N. C. Venzke, USCG, and members of their respective staffs. At the meeting the Coast Guard representatives explained its need to protect the information in question, and argued that it met the requirements for classification under the Order. I concurred on the need to protect the information, but stated that the information, from its description in the guide, was not national security information, i.e., "information, the unauthorized disclosure of which could reasonably be expected to cause damage to our national defense or foreign relations." The essence of our disagreement is ISOO's contention that wholly law enforcement information, even that which pertains to international drug trafficking, is not national security information under the Order.

Before reaching a final determination, however, we arranged an opportunity to review examples of the types of information to be classified under

a number of these documents at Coast Guard headquarters. While we are most sympathetic to the Coast Guard's operational need to protect this information, we concluded that almost all of the documents we reviewed pertained exclusively to law enforcement activities, and not to national security as that term is perceived and practiced under E. O. 12356.

Therefore, it is my determination that the provisions of "Commandant Instruction 5510" are in violation of Executive Order 12356 and its implementing IS00 Directive, except for Items 6 and 13, Enclosure (5); so much of Items 11 and 12, Enclosure (5), as are provided by foreign governments or their representatives; and so much of Item 3, Enclosure (6) that pertains to those intelligence sources and methods, the unauthorized disclosure of which reasonably could be expected to damage our national defense or foreign relations, and not simply our ability to conduct law enforcement operations. In order to prevent the unauthorized classification of information, I direct that the Instruction not be implemented as currently drafted, and that any revisions be reviewed and approved by IS00 before implementation. Please note that this decision has no bearing on DOT's efforts to protect the information in question through pertinent administrative procedures or to except it from mandatory disclosure under the Freedom of Information Act under exemptions other than national security. Other agencies dealing with similar information have utilized other administrative procedures to protect it.

I am available at your convenience to discuss this matter with you or members of your staff. Because of the excellent cooperation and cordiality that I and the other IS00 staff members have received from DOT and Coast Guard representatives, I am still hopeful that we might be able to work out a solution amicably and quickly.

As I noted above, as Secretary of Transportation you may appeal this decision to the National Security Council. Because there has never previously been a situation in which a decision of the Director of IS00 has been appealed to the National Security Council, I suggest that, if this is the route you choose to follow, your staff coordinate this process with me in order to expedite its consideration. I can be reached at 535-7251.

Sincerely,

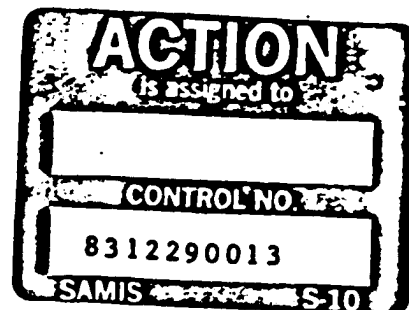

STEVEN GARFINKEL
Director

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THE WHITE HOUSE
WASHINGTON

December 14, 1983



MEMORANDUM FOR THE HONORABLE ELIZABETH H. DOLE
The Secretary of Transportation

SUBJECT: Security Classification Guide Relating to
International Narcotics Trafficking

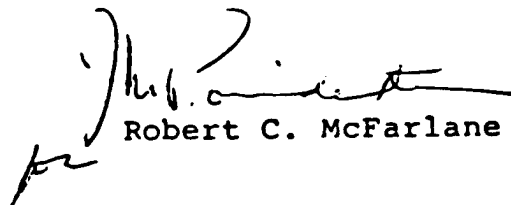
I very much appreciate your concern about what the U.S. Coast Guard sees as an apparent disparity between Executive Orders 12333 and 12356. Specifically, you seem to question why all sensitive information related to international drug trafficking, referenced in E.O. 12333, cannot be classified under E.O. 12356.

In response, I have had our staff review the two Executive Orders, and, while there is considerable overlap, we do not believe them to be contradictory. E.O. 12333 reflects the Administration's concern that the tools of our foreign intelligence gathering apparatus be utilized to our greatest lawful advantage. Included in that Order is authority to utilize existing intelligence capabilities in the fight against international drug trafficking. E.O. 12356 reflects several different goals concerning our administrative and judicial experiences with the prior information security system. However, as repeatedly expressed by the President and others within the Administration, the purposes behind E.O. 12356 were clearly not intended to expand the breadth of permissible classification. In regard to the classification system, E.O. 12356 is controlling.

As a result, some of the information produced or gathered by the Coast Guard in its operations concerning international narcotics trafficking may be classified, and some may not. Information relating to international narcotics trafficking in and of itself may not be classified because it is not within an assigned classification category. Its protection would be dependent upon other administrative or statutory mechanisms, including the "law enforcement information" exemption to the Freedom of Information Act. This distinction between law enforcement and national security information is routinely recognized by other agencies, including the Federal Bureau of Investigation, even in matters that involve international criminal activity.

On the other hand, when such information is derived from or linked to other information within an existing classification category, it may be classified, assuming the other tests for classification in E.O. 12356 are also met. Among possible examples are Coast Guard information that is linked to the operations of the Intelligence Community in gathering foreign intelligence or in counterintelligence; to a sensitive national defense objective carried out in conjunction with narcotics interdiction; or references to a foreign official or government that would impact adversely on our foreign relations.

To help draw these distinctions, I recommend that the Coast Guard continue to work closely with the Information Security Oversight Office (ISOO). Our own experience is that ISOO has been reasonable and flexible in seeking to resolve disputes within the executive branch regarding the application of the classification system.



Robert C. McFarlane

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